SNOHOMISH COUNTY COUNCIL

BSRE POINT WELLS, LP, Appellant, v. SNOHOMISH COUNTY PLANNING AND DEVELOPMENT SERVICES, Respondent.	NO. 11-01457 LU/VAR 11-101461 SM 11-101464 RC 11-101008 LDA 11-101007 SP BSRE POINT WELLS, LP'S SUPPLEMENTAL WRITTEN ARGUMENT

BSRE POINT WELLS, LP ("BSRE"), by and through its undersigned counsel of record, hereby submits this supplemental written argument in support of, and to provide additional clarification on, select issues raised in its Appeal of the Amended Decision Denying Extension and Denying Applications Without Environmental Impact Statement dated August 3, 2018 (the "Appeal"), filed with the Snohomish County Council (the "Council") on August 17, 2018. BSRE hereby expressly incorporates its Statement of Facts and Argument and Legal Authority set forth in its Appeal, as well as all attachments submitted therewith. This Supplemental Written Argument is submitted in order to provide additional clarification of the issues addressed in the Appeal and is not intended in any way to limit the issues of the appeal as a whole.

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III. SUPPLEMENTAL ARGUMENT AND LEGAL AUTHORITY

A. BSRE's Urban Center Development Application is Vested to Chapter 30.34A SCC as it Existed on the Date of Filing.

BSRE and Snohomish County (the "County") have a long history of working together to protect the vested status of BSRE's Urban Center Development Application (and other related supporting applications, collectively, the "Land Use Applications"). Together, the parties prevailed in litigation which was eventually decided by the Washington State Supreme Court. *See Woodway v. Snohomish County*, 180 Wn.2d 165, 322 P.3d 1219 (2014). In *Woodway*, the Court ruled that the Land Use Applications vested to the Urban Center Code despite the Urban Center Code later being replaced by the Urban Village Code.

Part of the Urban Center Code in effect at the time the Land Use Applications were filed is SCC 30.34A.180(2)(f) (2007). This provision, adopted pursuant to Ordinance 09-079, stated:

> The Hearing Examiner may deny an urban center development application without prejudice pursuant to SCC 30.72.060. If denied without prejudice, the application may be reactivated under the original project number and without additional filing fees or loss of project vesting if a revised application is submitted within six months of the Hearing Examiner's decision. In all other cases a new application shall be required.

This provision was proposed by BSRE at the time of adoption of the Urban Center Code to specifically address the exact situation present here. At the time of its adoption, both BSRE and the County understood that the applications for development on BSRE's property ("Point Wells" or the "Site") would be complex and would involve lengthy negotiations with multiple jurisdictions. The adoption of SCC 30.34A.180(2)(f) (2007) was based in large part on the realization that Urban Center development projects are, by definition, extremely complicated. Senior Planner Ryan Countryman acknowledged this before the Hearing Examiner when he

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testified that applications for this type of development would be expected to have seven or eight rounds of review by the Department of Planning and Development Services ("PDS") before proceeding to review under the State Environmental Protection Act ("SEPA") and the attendant preparation of an environmental impact statement ("EIS"). PDS and the Council agreed to this provision and approved SCC 30.34A.180(2)(f) (2007) specifically to allow BSRE to have a second chance with its Land Use Applications, if necessary, because of the complexity of the project.

i. The Decision was Without Prejudice.

The Hearing Examiner, in the Amended Decision Denying Extension and Denying Applications Without Environmental Impact Statement dated August 3, 2018 (the "Decision"), stated: "BSRE's development applications are denied without prejudice pursuant to SCC 30.72.060(3) (2013)." Pursuant to SCC 30.34A.180(2)(f) (2007), BSRE should have the right to resubmit its Land Use Applications within six months of the Hearing Examiner's Decision without losing its vested status.

ii. The Hearing Examiner Failed to Recognize BSRE's Vested Status.

The Decision is silent about whether BSRE is vested to SCC 30.34A.180(2)(f) (2007). However, in the Decision Granting in Part and Denying in Part BSRE's Motion for Reconsideration and Clarification (the "Reconsideration Decision"), the Hearing Examiner noted that the provision allowing an applicant to resubmit its application within six months of a denial without prejudice without losing its vested status was repealed in 2013. *See* Attachment A. The Hearing Examiner continued, stating:

> SCC 30.34A.180 does not authorize the Hearing Examiner to deny BSRE's application without prejudice, consequently allowing BSRE to reactivate its application within six months. The Hearing Examiner does not have authority to deny BSRE's application without prejudice under SCC 30.34A.180 and the Hearing Examiner

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therefore will not do so."

Id. By stating that SCC 30.34A.180 (2007) had been repealed, the Hearing Examiner failed to recognize BSRE's vested status. The Hearing Examiner made this decision without permitting the parties to provide additional briefing on BSRE's vested status and without asking PDS about whether it considers BSRE to be vested to SCC 30.34A.180(2)(f) (2007).

Regardless of the Hearing Examiner's statement about SCC 30.34A.180(2)(f) (2007) having been repealed, the Hearing Examiner expressly stated that he was denying the Land Use Applications without prejudice pursuant to SCC 30.70.060, which is the type of denial afforded protection under SCC 30.34A.180(2)(f) (2007).

iii. The County Has Consistently Held that the Land Use Applications Are Vested to SCC 30.34A.180(2)(f) (2007).

In its arguments before the Supreme Court in *Woodway* and in its review letters, PDS has consistently recognized BSRE's vested status. In its October 6, 2017 review letter (the "October 2017 Letter"), PDS stated: "Review of Chapter 30.34A SCC refers to the Land Use permit for an urban center site plan, 11-101457 LU, unless otherwise noted. The review is per the code in effect when 11-101457 LU was submitted, i.e. the March 4, 2011, version of code, unless explicitly identified otherwise." *See* Exhibit K-31, p. 79. The October 2017 Letter goes on to list this specific provision, stating: "***Former SCC 30.34A.180*** . . . **Subsection (2)(f)** allows the Hearing Examiner to deny the project without prejudice and, if this happens, allows the applicant to reactivate the project." *Id.* at p. 98 (emphasis in original). In addition, PDS set forth the entire provision of the former SCC 30.34A.180 (2007) in the October 2017 Letter in PDS's list of code provisions to which the Land Use Applications are vested. *See id.* at pp. 245-48. This is consistent with the Supreme Court's ruling in *Woodway*: "BSRE's development rights vested to the plans and

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regulations in place at the time it submitted its permit applications." *Woodway*, 180 Wn.2d at 180-81.

iv. The County Should Be Estopped From Now Arguing that the Land Use Applications are Not Vested to SCC 30.34A.180(2)(f).

Because the County has consistently stated that BSRE's Land Use Applications are vested to SCC 30.34A.180(2)(f) in its review letters and before the Supreme Court, the County should be estopped from now arguing that SCC 30.34A.180 (2007) does not apply to the Land Use Applications.

Equitable estoppel exists where there is (1) an admission, statement, or act inconsistent with the claim afterward asserted; (2) action by another in reliance upon that admission, statement or act; and (3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission. *Shafer v. State*, 83 Wn.2d 618, 623, 521 P.2d 736 (1974). The doctrine of equitable estoppel can be applied against a county. *See, e.g., Lybbert v. Grant County*, 93 Wn. App. 627, 969 P.2d 1112 (1999).

Here, the County has made multiple representations that BSRE is vested to the entire Urban Center Code, including SCC 30.34A.180 (2007). BSRE has relied on those statements by continuing to pursue its Land Use Applications and by requesting that the Hearing Examiner deny the Land Use Applications without prejudice. There is no question that BSRE will be harmed by the County changing its position now in arguing that BSRE is not vested to SCC 30.34A.180 (2007). Therefore, the County should be estopped from arguing that the Land Use Applications are not vested to SCC 30.34A.180(2)(f) (2007).

v. SCC 30.34A.180 (2007) is a Land Use Ordinance to Which Applications Vest.

The County Code and Washington State law expressly provide that applications are vested

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to "land use ordinances." Even if the County was not estopped from now changing its position, the Land Use Applications would still be vested to SCC 30.34A.180(2)(f) (2007) because it is a "land use ordinance."

Washington's "vested rights doctrine" employs a "date certain" standard for vesting. *Snohomish County v. Pollution Control Hearings Board*, 187 Wn.2d 346, 387 P.3d 1064 (2016). That standard "entitles developers to have a land development proposal processed under the regulations in effect at the time a complete building permit application is filed, regardless of subsequent changes in zoning or other land use regulations." *Id.* at 358. A land use application is therefore vested to any "zoning or land use control ordinance" in effect on the date it is filed. *Id.* at 362.

In 2016, the County adopted Amended Ordinance 16-004, which provides: "[A]n application for a permit or approval type set forth in SCC Table 30.70.140(1) shall be considered under the development regulations in effect on the date a complete application is filed . . . ." SCC 30.70.300(1). This provision was not in place when the Land Use Applications were filed, and therefore is inapplicable. However, even if it was applicable, it further provides support to the idea that the Land Use Applications are vested to SCC 30.34A.180 (2007). A "development regulation" is defined as "those provisions of Title 30 SCC that exercise a restraining or directing influence over land, including provisions that control or affect the type, degree or physical attributes of land development or use." SCC 30.70.300(3).

SCC 30.34A.180(2)(f) (2007) is certainly a provision of Title 30 SCC which exercises a "restraining or directing influence over land" because it provides property owners with a significant property right – the right to continue development efforts under the same provisions in effect at the time an application was filed, even if that application has been denied without

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prejudice. Similarly, pursuant to Washington's vested rights law, SCC 30.34A.180(2)(f) (2007) is properly deemed a "land use control ordinance".

B. Five Years is Not Too Long.

The Land Use Applications were filed in 2011. However, the Land Use Applications were tied up in litigation until 2014, when the Supreme Court issued its decision in *Woodway*. Until that time, it was unclear whether BSRE was vested to the Urban Center Code. For that reason, the parties did not substantively proceed with processing the Land Use Applications from 2011 to 2014. In addition, there was a stay in place preventing the County from even considering the Land Use Applications until 2013. The County submitted its first Review Completion Letter on April 12, 2013. *See* Exhibit K-4. The life of the Land Use Applications has been, at most, five years – not seven.

As Ryan Countryman testified on May 21, 2018, applications typically go through seven or eight iterations. With a project this complex, it is understandable why multiple iterations are necessary, both from the applicant's perspective as well as that of the County. Multiple reviews allow both parties to ensure code compliance. The time period from 2014 to 2018 involved significant work by BSRE, including numerous meetings with Shoreline and Woodway to try to address the complaints about expected traffic impacts received from the neighboring jurisdictions. For years, the County was understanding of this approach and in fact encouraged BSRE to work with those neighboring jurisdictions.

This project is by far the most complicated project that Snohomish County has ever seen (*see* Ryan Countryman's May 24, 2018 Testimony). However, it is not unheard of in Snohomish County for a development project to take this length of time for an approval. For example, an application was submitted to develop Frognal Estates Planned Residential Development (formerly

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known as Horseman's Trail Planned Residential Development) in April 2005. The draft EIS for Frognal Estates was not issued until July 2014, more than nine years after the application was submitted. *See* https://snohomishcountywa.gov/2541/16713/Frognal-Estates. While Frognal Estates is a large project, consisting of 112 single-family detached homes on 22.34 acres, it is nowhere near the size of Point Wells, which is to have 3,080 units on more than 60 acres, and which includes significant challenges with the topography. Given this, it makes sense that review of and revisions to the Land Use Applications have taken this amount of time. Cutting short the review process at this time is unreasonable in light of the complexity of this type of project.

C. No Residential Setback is Necessary.

SCC 30.34A.040(2)(a) provides:

> Buildings or portions of buildings that are located within 180 feet of adjacent R-9600, R-8400, R-7200, T or LDMR zoning must be scaled down and limited in building height to a height that represents half the distance the building or that portion of the building is located from the adjacent R-9600, R-8400, R-7200, T or LDMR zoning line (e.g. – a building or portion of a building that is 90 feet from R-9600, R-8400, R-7200, T or LDMR zoning may not exceed 45 feet in height).

The effect of SCC 30.34A.040(2)(a) is to limit the height of buildings located adjacent to specific residential zones. The Decision improperly holds that the buildings in the Urban Plaza must be restricted in height because they are located adjacent to residential zones.

However, there is no property which is zoned R-9600, R-7200, T or LDMR adjacent to the buildings proposed to be built by BSRE. Therefore, SCC 34A.040(2)(a) cannot apply to Point Wells.

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D. The Site is Located Adjacent to a High Capacity Route.

BSRE has supplied sufficient evidence to indicate that proximity to a high capacity transit route is sufficient to allow for additional height pursuant to SCC 30.34A.040(1). SCC 30.34A.040(1) states:

> The maximum building height in the UC zone shall be 90 feet. A building height increase up to an additional 90 feet may be approved under SCC 30.34A.180 when the additional height is documented to be necessary or desirable *when the project is located near a high capacity transit route* or station and the applicant prepares an environmental impact statement pursuant to chapter 30.61 SCC that includes an analysis of the environmental impacts of the additional height on, at a minimum:
>
> (a) Aesthetics;
> (b) light and glare;
> (c) noise;
> (d) air quality; and
> (e) transportation.

SCC 30.34A.040(1) (emphasis added). The plain language of the statute provides two alternatives for high capacity transit—the project must be located either near a high capacity transit route *or* a high capacity transit station. SCC 30.34A.040(1) (emphasis added). Here, there can be no dispute that the Site is located on or near a high capacity transit route. Therefore, additional height for the buildings is available because BSRE has satisfied the conditions of SCC 30.34A.040(1).

IV. CONCLUSION

Based on the foregoing, BSRE respectfully requests that the Snohomish County Council grant all of the relief requested in the Appeal.

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DATED this 7th day of September, 2018.

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The undersigned certifies that on Friday, September 07, 2018, I caused to be served the foregoing document to:

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I declare under penalty of perjury under the laws of the state of Washington on Friday, September 07, 2018, at Seattle, Washington.

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Attachment A

BEFORE THE HEARING EXAMINER
IN AND FOR THE COUNTY OF SNOHOMISH

In Re Point Wells Urban Center. BSRE Point Wells LP, Applicant, Snohomish County Planning and Development Services Department, Respondent.	No. 11-101457 LU/VAR 11-101461 SM 11-101464 RC 11-101008 LDA 11-101007 SP Decision Granting in Part and Denying in Part BSRE's Motion for Reconsideration and Clarification

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I. SUMMARY

BSRE moved for reconsideration and clarification of the June 29, 2018 decision. For the reasons explained below, the motion is granted in part and denied in part. An amended decision is issued contemporaneously herewith that clarifies the denial of the development applications is without prejudice and that the appellate venue is the County Council. The remainder of the motion is denied.

II. RESIDENTIAL SETBACK

BSRE contends that the residential setback requirement of SCC 30.34A.040 does not apply to the buildings proposed in the Urban Plaza because the adjacent property is within the town of Woodway and county code only mandates a setback from parcels zoned by Snohomish County.[1]

SCC 30.34A.040 requires urban center buildings within 180 feet of adjacent R-9,600, R-8,400, R-7,200, Townhouse (T), or Low Density Multiple Residential (LDMR) zones be scaled down from the 90 foot height maximum otherwise allowed in an Urban Center zone. The property adjacent to the Urban Plaza is within the town of Woodway. Woodway's zoning is not identical to Snohomish County's nor does it use the same labels to identify land use zones.

PDS administers county code requirements that depend on adjacent zoning by matching the adjacent jurisdiction's zoning to the most similar county zoning. In this case, Woodway's large lot residential zoning is most similar to the county's R-9,600 because R-9,600 is the largest residential lot size zoning in urban areas of unincorporated Snohomish County.

BSRE points out that county code only lists the county zoning types and does not include a catchall provision allowing PDS to analogize the adjacent jurisdiction's zoning to the county's zoning.

PDS and the Hearing Examiner must implement the intent of the county code, giving meaning to all words in the ordinance, and not interpreting the code to yield absurd results that contradict the otherwise clear intent of the code. Here, the code clearly and unequivocally intends to graduate building heights from the urban center maximum to the lower maximum of adjacent residential areas. BSRE's interpretation of the code yields a result that contradicts the express desire of the code.

The Hearing Examiner therefore denies the petition for reconsideration of the portion of the decision relating to residential setbacks for the Urban Plaza buildings.

III. ORDINARY HIGH WATER MARK

BSRE argues (1) that PDS did not identify BSRE's failure to set back buildings 150 feet from the ordinary high water mark of marine waters until it filed the supplemental

[1] BSRE Motion for Reconsideration, 2:22-3:22.

departmental report[2] with the Hearing Examiner on May 9, 2018[3] and (2) BSRE redesigned the project to eliminate intrusion into the marine water buffer.

A. PDS Notice to BSRE

County code requires a 150 foot buffer from marine waters, measured from the ordinary high water mark shoreward. SCC 30.62A.320. BSRE's proposed site plan located four buildings within the buffer.

The use of the ordinary high water mark as the starting point to measure the buffer is not obscure; it has been clearly and unambiguously stated in county code since 2007.[4]

BSRE, not PDS, is responsible for designing a project that complies with county code. BSRE effectively argues that it should be absolved of its failure to comply with county code because PDS did not catch BSRE's failure sooner.[5]

BSRE is charged with knowledge of county code; PDS' alleged failure to catch BSRE's mistake sooner is not material to the Hearing Examiner's decision.

B. Redesign

BSRE argues for reconsideration because it redesigned the project to eliminate the buildings' intrusion into the marine waters' buffer.[6] Reconsideration is futile in this situation because BSRE's application expired on June 30, 2018 and the application is not yet approvable even if the newest site plan used the correct marine water buffer.

IV. INNOVATIVE DEVELOPMENT DESIGN

BSRE seeks reconsideration regarding its innovative development design (IDD). BSRE did not compare how its design to the prescriptive standards of county code demonstrate how the proposed IDD would result in functions and values of critical areas equal to or better than compliance with the prescriptive standards. BSRE remedied that defect and seeks reconsideration.[7] Reconsideration is futile in this situation because BSRE's application

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[2] Ex. N.2.

[3] BSRE realized its error before the supplemental staff report was filed because BSRE's expert testified he was charged to determine the ordinary high water mark in March 2018 and the supplemental departmental report was not filed until May 2018.

[4] Amended Ord. 06-061, Ex. A, 18:3-6 (adopted August 1, 2007, eff. Oct. 1, 2007).

[5] BSRE says "As soon as BSRE became aware of the issue with the OWHM, it authorized its consultants to begin work to determine the OWHM." Motion, 5:22-23. BSRE's designers could have, and should have, been aware that the OWHM is the demarcation for marine waters buffer because SCC 30.62A.320(1)(b)(ii) explicitly said so since 2007, several years before BSRE filed its urban center application.

[6] SCC 30.72.065(2)(f) (2013) ("The applicant proposed changes to the application in response to deficiencies identified in the decision.")

[7] *Id.*

expired on June 30, 2018 and the application is not yet approvable even the critical areas report corrects the deficiency.

V. BONUS HEIGHT/HIGH CAPACITY TRANSIT

BSRE petitions for reconsideration on the issue of whether it is able to claim bonus height because of proximity to high capacity transit. BSRE argues that proximity is sufficient, that it acted diligently in attempting to reach agreement with Sound Transit, that it acted reasonably to provide alternative high capacity transit via water taxi, and the Hearing Examiner erred by raising a "new issue" regarding whether the height bonus was necessary or desirable.

It is important to understand the procedural context. Neither BSRE nor PDS asked the Hearing Examiner to approve the project. PDS asked the Hearing Examiner to deny the application because the development application substantially conflicted with county code. BSRE asked the Hearing Examiner to remand the application and grant a fourth extension of time for the application's expiration.

With respect to the "new" issue, the Hearing Examiner found that BSRE's application substantially conflicted with county code because the application depended on building heights far taller than 90 feet and made no effort to prove additional height was desirable or necessary. County code explicitly requires proof of desirability or necessity:

> The maximum building height in the UC zone shall be 90 feet. A building height increase up to an additional 90 feet may be approved under SCC 30.34A.180 **when the additional height is documented to be necessary or desirable** when the project is located near a high capacity transit route or station . . . .

Amend. Ord. 09-079, p. 57 (adopted May 12, 2010, effective May 29, 2010) (emphasis added).

PDS made a prima facie demonstration that the proposal substantially conflicted with county code: 21 buildings substantially exceed the height limit. Though it had the burden of demonstrating compliance with SCC 30.34A.040 (2010), BSRE offered no evidence that the height bonus was desirable or necessary.[8] The Hearing Examiner must therefore conclude the proposing 21 of 46 buildings taller than 90 feet is a substantial conflict, requiring denial of the application. *Q.E.D.*

BSRE argues that unless PDS explicitly raised the issue of failure to prove desirability or necessity, the Hearing Examiner may not base a ruling on it. This argument fails for several reasons. First, PDS identified non-compliance with SCC 30.34A.040 (2010) as an issue,

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[8] ""[T]he record is silent on this issue." BSRE Motion for Reconsideration, 13:24.

though PDS focused on access to a high capacity transit station. Similar to a *Celotex*[9] motion, PDS argued that BSRE could not show compliance with .040 and BSRE did not demonstrate compliance. Second, BSRE effectively argues that the Hearing Examiner must presume compliance with county code. The Hearing Examiner cannot presume compliance with a 90 foot building height limit when the facts indisputably and unequivocally demonstrate 21 buildings substantially exceed the building height limit. Third, BSRE misapprehends the quasi-judicial process and the role of the Hearing Examiner. The Hearing Examiner's role includes determining whether an applicant's proposal complies with county code.[10]

BSRE argues that county code defines high capacity transit to include water taxis and therefore its proposal to provide water taxi service until Sound Transit provides commuter rail service satisfies the bonus height requirement of high capacity transit. Water taxi service at least requires amendment of the DNR lease and a conditional use permit. The evidence presented in the open record hearing was that a water taxi was an option that BSRE would provide if needed to obtain the height bonus. Little to no evidence was presented beyond that high level conclusion; it was a conceptual fall back plan without details. Further, a water taxi option is immaterial where, as here, BSRE presented no evidence that the bonus height was necessary or desirable.

PDS asked the Hearing Examiner to deny BSRE's application because the application substantially conflicted with SCC 30.34A.040 because 21 buildings exceed the 90 foot height limit. PDS made a prima facie showing of substantial conflict. BSRE had the burden of demonstrating by a preponderance of evidence that its application complies with SCC 30.34A.040. It failed to do so. Therefore, its application was denied.

BSRE asks for a fourth extension of the expiration of its application on remand. PDS objected, in part because of a lack of demonstrated progress with Sound Transit regarding a station at Point Wells which could have triggered the building height bonus. BSRE argues that it had more communications with Sound Transit than referred to in the decision. BSRE points to testimony, however, that was general, conclusory, and notably lacking in detail and specificity. The Hearing Examiner did not find it persuasive. Considering the totality of the circumstances from the exhibits and testimony, the Hearing Examiner found that BSRE was not diligent with respect to obtaining high capacity transit service at Point Wells. This lack of diligence is one reason why the Hearing Examiner would not have granted an extension on remand.

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[9] "[A]fter adequate time for discovery and upon motion, [summary judgment must be entered] against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986). *See also Jackson v. Esurance Ins. Co.*, 2 Wn. App. 2d 470, 477. 412 P.3d 299, 302 (2017).

[10] *N.B.* Most Superior Court judges would not find for a party who has the burden of proving every element of the cause of action but fails to adduce any evidence on a required element of a cause of action.

VI. LANDSLIDE DEVIATION

BSRE asks the Hearing Examiner to reconsider his decision regarding BSRE's ability to obtain a deviation from the landslide hazard area regulations. BSRE submits additional information which it believes resolves the defects cited in the decision.

The issue presented was whether the development application as it stood in early 2018[11] substantially conflicted with county code, justifying early termination of the EIS process and denial of the application. Approval of the project would require the Chief Engineering Officer of PDS to grant a deviation from the landslide hazard area regulations.

The Hearing Examiner's decision determined that the Chief Engineering Officer was unlikely to grant a deviation based upon the application as it then stood. The improbability of a successful deviation request results in a substantial conflict with county code.

BSRE's post-decision attempt to increase its likelihood of a successful deviation request is immaterial where, as here, its application expired.

VII. EXTENSION

The Hearing Examiner does not have either original or appellate jurisdiction over a request for extension of a development application's expiration date. County code provides no mechanism to appeal the PDS Director's decision rejecting a request for an extension,[12] nor does it provide the Hearing Examiner with original jurisdiction to consider a request for an extension.[13] County code only gives the Hearing Examiner ancillary jurisdiction, i.e., the Hearing Examiner's ability to extend an expiration date is ancillary to the Hearing Examiner's decision on the development application.

Thus, the only circumstance under which the Hearing Examiner has the authority to extend an application's deadline is when the Hearing Examiner remands the application to PDS for further processing.

As indicated in the decision, however, the facts do not justify such an extension even if the Hearing Examiner remanded the application for further processing. Based on the entirety of the record, the Hearing Examiner found that BSRE had not prosecuted its development application with sufficient diligence to justify a fourth extension of the application's expiration date. Though the project is complex, the project should have been either complete or very close to complete after five years. It wasn't.

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[11] Five years after litigation ended and seven years after the application was filed.

[12] SCC 30.71.020 (2017) lists all "type 1" administrative decisions by PDS which may be appealed to the Hearing Examiner. SCC 30.71.050(2) (2013). None of the listed type 1 administrative decisions includes the Director's decision refusing to extend an application's expiration date. *See State v. LG Elecs., Inc.*, 186 Wn.2d 1, 9, 375 P.3d 636, 640 (2016) ("Under the age old rule *expressio unius est exclusio alterius*, '[w]here a statute specifically designates the things upon which it operates, there is an inference that the Legislature intended all omissions.'")

[13] SCC 30.72.020 (2015).

VIII. PREJUDICE

BSRE asks the Hearing Examiner to clarify whether he denied BSRE's application with or without prejudice. BSRE contends the Hearing Examiner has the authority deny its urban center application without prejudice, citing SCC 30.34A.180(2)(f) (2007) and SCC 30.72.060(3). An urban center development application under chap. 30.34A SCC is a type 2 decision. County code explicitly allows the Hearing Examiner to deny a type 2 development application without prejudice.[14] The Hearing Examiner contemporaneously reissues an amended decision denying the application and clarifying that it is without prejudice pursuant to SCC 30.72.060(3) (2013).

A. SCC 30.34A.180

While BSRE's application may vest to the zoning and land use controls in effect at the time it filed its complete urban center application, its application does not similarly vest the Hearing Examiner's jurisdiction and authority.[15] The 2007 amendment to SCC 30.34A.180 gives the Hearing Examiner authority to deny the urban center without prejudice and allows the applicant to "reactivate" its application within six months. This authority was revoked by the 2013 amendment. Ord. 13-007 §28 (adopted Sept. 11, 2013, eff. Oct. 3, 2013). SCC 30.34A.180 does not authorize the Hearing Examiner to deny BSRE's application without prejudice, consequently allowing BSRE to reactivate its application within six months. The Hearing Examiner does not have the authority to deny BSRE's application without prejudice under SCC 30.34A.180 and the Hearing Examiner therefore will not do so.

B. SCC 30.72.060

BSRE correctly cites SCC 30.72.060(3) for the proposition that the Hearing Examiner has the authority to deny an application without prejudice.[16] BSRE's application for development in an area zoned Urban Center is a type 2 application. SCC 30.72.020(11) (2015). The Hearing Examiner is explicitly authorized to "grant, grant in part, return to the applicable department and applicant for modification, deny without prejudice, deny, or grant" the application. SCC 30.72.060(3) (2013).

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[14] SCC 30.72.060(3) (2013). *N.B.* The Hearing Examiner only has authority to deny the type 2 urban center application without prejudice. He does not have authority to deny the requested extension without prejudice because the requested extension is not a type 2 application. The denial of the extension is a consequence of not remanding the type 2 application.

[15] Hearing Examiner jurisdiction and authority are not development regulations because his authority does not "exercise a restraining or directing influence over land." Development regulations control or affect the type, degree, or physical attributes of land development or use. The Hearing Examiner's authority is procedural, similar to fees, which are explicitly excluded from the definition of development regulations. SCC 30.70.300(3) (2017).

[16] "The hearing examiner may grant, grant in part, return to the applicable department and applicant for modification, deny without prejudice, deny, or grant with such conditions or modifications as the hearing examiner finds appropriate based on the applicable decision criteria." SCC 30.72.060(3) (2013).

County code does not provide guidance regarding the circumstances or criteria by which applications should be remanded for further work, denied without prejudice, or denied.[17] The options suggest a continuum ranging from an application that could not be approved without substantial, material changes to an application that requires some changes that are not material but cannot be resolved simply by appropriately conditioning the approval.

In this case, the application could not be approved for several reasons, including the lack of an EIS and the problems identified in the record. PDS appropriately interrupted the EIS process in early 2018 because the application then extant substantially conflicted with county code.

Considering the entire record, the Hearing Examiner grants BSRE's request to clarify his decision and will issue an amended decision clarifying that his denial is without prejudice.

The decision will be amended as follows:

> The Hearing Examiner grants PDS' request to deny the applications without prejudice pursuant to SCC 30.72.060(3) (2013) because some of the conflicts with county code are substantial.

Decision Denying Extension, 1:7-9.

> PDS' request to deny project approval prior to completion of the environmental impact statement is granted in part and denied in part. BSRE's development applications are denied without prejudice pursuant to SCC 30.72.060(3) (2013).

Id., 28:31-32.

IX. APPEAL

BSRE asks the Hearing Examiner to reconsider that portion of the decision describing appeal procedures. The Hearing Examiner notes first that the decision does not create or confer jurisdiction, either on County Council or the Superior Court. County code mandates description of reconsideration and appeal procedures, but does not create appellate jurisdiction. SCC 2.02.155(5) (2013).

The open record hearing and decision dealt with two requests: (1) PDS' request pursuant to SCC 30.61.220 (2012) to deny the application prior to completion of the environmental impact statement and (2) BSRE requested an extension of the expiration of its urban center development application on remand pursuant to SCC 30.70.140(2)(b) (2017).

[17] The difference between denial and denial without prejudice appears to be that denial results in a one year prohibition on applying for "substantially the same matter" while denial without prejudice does not trigger a one year bar. SCC 30.70.150 (2003).

A. DENIAL

PDS' request to deny BSRE's application is grounded in SCC 30.61.220 (2012). Snohomish County implements the State Environmental Policy Act (SEPA) in chap. 30.61 SCC. Appeals from SEPA determinations typically are heard by the Hearing Examiner, whose decision is the final county decision. Further appeals are heard by the Superior Court pursuant to the Land Use Petition Act (LUPA), not County Council. SCC 30.61.330 (2003). The Hearing Examiner therefore described the appellate procedure and time limits consistent with SEPA appeals.

The Hearing Examiner grants BSRE's petition regarding appellate procedures and reconsiders his decision. Although PDS' request to deny the application arises under chap. 30.61 SCC, SCC 30.61.220 (2012) points to chap. 30.72 SCC and chap. 30.71 SCC by referring to "decision-making body." SCC 30.61.220(3) (2003). Therefore, the Hearing Examiner agrees with BSRE that PDS' requested denial triggers the appellate procedure for type 2 decisions, i.e., appeals lie to County Council and not to Superior Court.[18] The decision will be amended as follows to reflect this procedural correction.

> ~~This decision is a final decision of the Hearing Examiner, but may be appealed by filing a land use petition in the Snohomish County Superior Court. If no party to the appeal requests reconsideration, the petition to the Superior Court **must** be filed with the Superior Court Clerk **no later than 21 days after this decision.** The date of issuance is calculated by RCW 36.70C.040(4). If a request for reconsideration is filed by any party to the appeal, the Superior Court action **must be filed no later than 21 days after the reconsideration decision is issued.** The date of issuance of any reconsideration decision is calculated by RCW 36.70C.040(4). For more information about appeals to Superior Court, including, but not limited to, required steps that must be taken to appeal this decision, please see the Revised Code of Washington, Snohomish County Code, and applicable court rules.~~
>
> ~~The cost of transcribing the record of proceedings, of copying photographs, video tapes, and oversized documents, and of staff time spent in copying and assembling the record and preparing the return for filing with the court shall be borne by the petitioner. SCC 2.02.195(1) (b) (2013). Please include PDS file number in any correspondence regarding this case.~~
>
> An appeal to the County Council may be filed by any aggrieved party of record **on or before August 17, 2018.** Where the reconsideration process of SCC 30.72.065 has been invoked, no appeal may be filed until the reconsideration petition has been decided by the Hearing Examiner. An

[18] Note, however, that the Hearing Examiner's description of the process for appealing his decision is not binding on either County Council or the Superior Court. The Hearing Examiner cannot create jurisdiction.

aggrieved party need not file a petition for reconsideration but may file an appeal directly to the County Council. If a petition for reconsideration is filed, issues subsequently raised by that party on appeal to the County Council shall be limited to those issues raised in the petition for reconsideration.

Appeals shall be addressed to the Snohomish County Council but shall be filed in writing with the Department of Planning and Development Services, 2nd Floor, County Administration-East Building, 3000 Rockefeller Avenue, Everett, Washington (Mailing address: M/S No. 604, 3000 Rockefeller Avenue, Everett, WA 98201), and shall be accompanied by a filing fee in the amount of five hundred dollars ($500.00) for each appeal filed; PROVIDED, that the fee shall not be charged to a department of the County. The filing fee shall be refunded in any case where an appeal is summarily dismissed in whole without hearing under SCC 30.72.075.

An appeal must contain the following items in order to be complete: a detailed statement of the grounds for appeal; a detailed statement of the facts upon which the appeal is based, including citations to specific Hearing Examiner findings, conclusions, exhibits or oral testimony; written arguments in support of the appeal; the name, mailing address and daytime telephone number of each appellant, together with the signature of at least one of the appellants or of the attorney for the appellant(s), if any; the name, mailing address, daytime telephone number and signature of the appellant's agent or representative, if any; and the required filing fee.

The grounds for filing an appeal shall be limited to the following:

(a) The decision exceeded the Hearing Examiner's jurisdiction;

(b) The Hearing Examiner failed to follow the applicable procedure in reaching his decision;

(c) The Hearing Examiner committed an error of law; or

(d) The Hearing Examiner's findings, conclusions and/or conditions are not supported by substantial evidence in the record. SCC 30.72.080

Appeals will be processed and considered by the County Council pursuant to the provisions of chapter 30.72 SCC. Please include the County file number in any correspondence regarding the case.

Decision, 30:7-21.

B. Extension

BSRE sought an extension of the expiration of its urban center application if the Hearing Examiner denied PDS' request and remanded the application for further processing. BSRE received three prior extensions from the PDS Director. SCC 30.70.140(2)(a) (2017). The Director denied a fourth extension.

County code does not give the Hearing Examiner authority either to hear an appeal from the PDS' director rejection of a request for an extension or to hear an original application for an extension.

Extension of the expiration of a development application is a remedy when applicable to a type 2 matter or an appeal from a type 1 matter. There is no appeal process for denial of an extension in this circumstance; denial of the requested extension would be subsumed within an appeal from the Hearing Examiner's decision on the type 2 urban center development application.

X. CONCLUSION

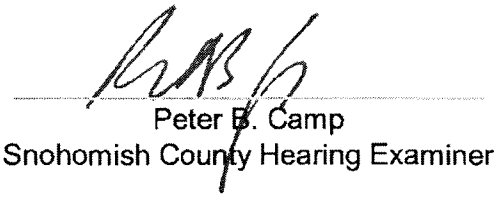
The Hearing Examiner grants BSRE's motion for reconsideration and clarification in part and denies the motion in part.

The Hearing Examiner grants the motion for reconsideration with respect to appeal procedures, but cautions BSRE, PDS, and parties of record that the information provided is advisory only and does not create jurisdiction. In other words, a reviewing court may come to a different conclusion regarding the correct appeal process. The Hearing Examiner contemporaneously issues an amended decision.

The Hearing Examiner grants the motion for clarification and amends the decision to state expressly that the denial of the development applications is without prejudice pursuant to SCC 30.72.060(3) (2013).

The Hearing Examiner denies BSRE's motion for reconsideration because (a) the Hearing Examiner believes the original decision to be correct and (b) reconsideration is futile because the application expired.

DATED this 3rd day of August, 2018.



Peter B. Camp
Snohomish County Hearing Examiner

RECONSIDERATION AND APPEAL PROCEDURES

This is an interim decision from which no right of appeal lies. As a decision on a motion for reconsideration, it is not subject to a further motion for reconsideration.

Staff Distribution:

Department of Planning and Development Services: Ryan Countryman

The following statement is provided pursuant to RCW 36.70B.130: "Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation." A copy of this Decision is being provided to the Snohomish County Assessor as required by RCW 36.70B.13